



(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

RIN 0750-AH92

Defense Federal Acquisition Regulation Supplement: Release of Fundamental Research Information (DFARS Case 2012-D054)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide guidance relating to the release of fundamental research information. This rule was previously published as part of the proposed rule 2011-D039, Safeguarding Unclassified DoD Information.

DATES: Effective: [Insert date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, 571-372-6090.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule, DFARS case 2011-D039, in the Federal Register at 76 FR 38089 on June 29, 2011, to address

requirements for safeguarding unclassified information. The scope of this final rule is limited to only the modifications contained within the proposed rule to DFARS 252.204-7000, Disclosure of Information. This text was separated from the proposed rule, and is being published separately as a final rule, because the changes in this DFARS clause deal with the release of information on fundamental research projects and not safeguarding. This rule was initiated to implement guidance provided by the Under Secretary of Defense for Acquisition, Technology and Logistics (AT&L) in a memorandum on Fundamental Research dated May 24, 2010, and a memorandum on Contracted Fundamental Research dated June 26, 2008. The memoranda provided additional clarifying guidance to ensure that DoD does not restrict disclosure of the results of fundamental research, as defined by the National Security Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical and Engineering Information, unless such research efforts are classified for reasons of national security or otherwise restricted by applicable Federal statutes, regulations, or executive orders.

The comment period originally closed on August 29th, 2011, and was extended to December 16th, 2011. DoD received comments on the proposed rule from forty-nine respondents; however, only

fourteen (14) of the respondents addressed the changes contained within this final rule.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes from the proposed rule.

1. Subparagraph 252.204-7000(a)(1) is no longer being modified and will remain essentially intact.
2. Paragraph 252.204-7000(a)(3) is revised to no longer require a certification by the contracting component. Instead, the fundamental research determination must be made in writing.
3. Subparagraph 252.204-7000(b) is revised to modify the time period that requests for approval must be submitted to the contracting officer from 45 days to 10 business days. It also clarifies that the paragraph refers to the exception provided at subparagraph (a)(1).

B. Analysis of public comments

1. Clarification of certification process

Comment: Two respondents stated that the negotiation and determination of whether fundamental research is being performed should occur at the proposal stage whenever universities will be performing research services.

Response: Consistent with the text added at 252.204-7000(a)(3), fundamental research projects should be scoped and negotiated during the proposal stage and the written determination of fundamental research should be prepared prior to the research performer commencing work on the project.

Comment: Two respondents requested that definitions be provided for the following terms: "prime contractor," "research performer," and "contracting component." An additional respondent requested that DoD define the terms "project" and "certified."

Response: The term "contracting component" was used in the proposed rule but was changed to "contracting activity," which is defined in the FAR and supplemented within the DFARS. The meanings of the other terms in this rule do not vary from their usage in the commercial marketplace; therefore, explicit definitions will not be provided.

Comment: One respondent stated that the proposed rule does not allow for all circumstances in which contractors may be required to release unclassified information, e.g., compelled discovery during litigation. The respondent recommended that paragraph 252.204-7000(a)(1) of the DFARS text remain unchanged to allow the contracting officer to approve requests for disclosure in instances not outlined in the proposed rule.

Response: DoD has revised the final rule to keep the current text at DFARS 252.204-7000(a)(1) intact.

Comment: Two respondents expressed concern with the requirement that the contractor submit its request for approval at least 45 days before the proposed date for release of unclassified information. One respondent stated that there is no requirement in the NISPOM requiring the contractor to submit a request for information release to the contracting officer at least 45 days before the proposed date of the release. The respondent requested that DoD ensure that the requirements in the rule do not impact existing documents in an unintended way. Another respondent stated that when proposals are being prepared for new efforts, there is often insufficient time to provide a 45-day advance notice.

Response: The National Industrial Security Program Operating Manual (NISPOM) provides baseline standards for the protection of classified information in connection with classified contracts. The scope of DFARS 252.204-7000 is limited to the release of unclassified information; therefore, the requirements of this rule and NISPOM are mutually exclusive. However, due to advances in communication technology, since the clause was first added to the DFARS, DoD has revised the final rule to reduce the requirement to 10 business days, to alleviate burden on contractors.

Comment: One respondent stated that a presumption should exist that all funded research projects are fundamental research and that the information may be published without prior restriction unless an affirmative determination has been made by DoD that it is not fundamental research.

Response: The fundamental research presumption may be appropriate in instances when the research is funded through use of grants. However, the research performed in support of DoD contracts often falls in the categories of applied or advanced research and has the possibility of producing the seed for future defense technologies and therefore needs restrictions in place.

Comment: Several respondents stated that the prime contractor should not be involved in the determination and/or certification that a project is fundamental research. Some stated that the determination should be limited to the research performer and the contracting component. Others stated that the prime contractor should be required to submit any subcontractor's request for fundamental research certification to the contracting officer.

Response: There was no certification requirement in the proposed rule. The final rule allows for the contracting activity to coordinate with both the prime contractor and the research performer when making a fundamental research

determination. It is not appropriate for subcontractors to circumvent the prime contractor, because there is no privity of contract between the Government and the subcontractor.

2. National Security Decision Directive 189 (NSDD 189)

Comment: One respondent stated that the rule contradicts with NSDD 189, which requires that agencies determine classification requirements prior to award, while the proposed rule allows the determination to be made after award.

Response: The purpose of DFARS 252.204-7000 is to provide direction to contractors regarding when it is permissible for them to release unclassified information relating to DoD contracts. Instructions to the contracting activity concerning when classification determinations should be made fall under the National Industrial Security Program (NISP), which is outside of the scope of the clause and this rule.

3. Clarify/expand release categories

Comment: One respondent stated that further clarification was needed to expressly permit release of unclassified information without the contracting officer's approval for reporting obligations included elsewhere in the contract and/or required by applicable law.

Response: DoD has revised the proposed rule to revert to the current DFARS text at 252.204-7000(a)(1) which contemplates all circumstances in which contractors may be required to release

unclassified information. However, the contracting officer must be involved in the decision to release information pertaining to DoD contracts because of the potential security risks.

Comment: One respondent stated that the proposed rule should provide guidance on whether the restriction of unclassified information "to anyone outside the contractor's organization" applies to outsourced IT.

Response: Contractors should have controls in place that prevent the release of information by their subcontractors or outsourced IT through either flow-down of the clause at DFARS 252.204-7000 or obtaining nondisclosure agreements.

4. DoD contact

Comment: One respondent stated that a post-contract DoD-wide point of contact should be contained in the rule to account for instances when the need for the release of information occurs after contract completion and the contracting officer is not reachable.

Response: The scope of DFARS 252.204-7000 is limited to the permissibility of the release of unclassified information relating to DoD contracts. In circumstances where the contracting officer cannot be reached, the applicable contracting activity should be contacted.

5. Prescription

Comment: One respondent stated that the proposed rule should make clear that it is not authorized for use in university-based Budget Activity 1 or 2 contracts, absent exceptional circumstances justifying extremely rare exceptions made only with the approval of high-level component management. Another respondent stated that the proposed clause should not be adopted without emphasizing the inapplicability of the rule to contracts for fundamental research.

Response: The prescription requires that the clause be used when the contractor will have access to or generate unclassified information that may be sensitive and inappropriate for release to the public. The contracting officer has the discretion to not include the clause in any solicitation or contract when a judgment has been reached that the information may be freely released to the public.

6. Grants/cooperative agreements

Comment: One respondent stated that the proposed rule does not give any indication of its applicability to grants and/or cooperative agreements.

Response: The DFARS applies to purchases and contracts by DoD contracting activities. The Department of Defense Grant and Agreement Regulatory System (DODGARS) is the system of regulatory policies and procedures for the award and administration of grants and cooperative agreements.

7. Scope of fundamental research exemption

Comment: One respondent stated that the scope of the fundamental research exemption is not clear since it is not explicit in the DoD information definition.

Response: According to the NSDD 189, "fundamental research" means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons." The exemption will apply when the nature of the research has been determined to meet this definition.

8. Flowdown

Comment: One respondent stated that the proposed rule contradicts USD(AT&L) memorandum dated May 24, 2010, stating that "Provisions shall be made to accommodate such subcontracts for fundamental research and to ensure DoD restrictions on the prime contract do not flow down to the performer(s) of such research," by requiring the contractor to include a similar requirement in each subcontract. The respondent recommended that the paragraph be revised to state that the similar requirement is not required in subcontracts if any of the exemptions apply.

Response: In circumstances where a project is determined to be fundamental research in accordance with the final rule, the prime contractor will not be restricted on the release of information resulting from or arising during that project.

Therefore, the determination will flow down to subcontractors for portions of the work determined to be fundamental research.

Comment: One respondent stated that significant outreach is needed to DoD firms to ensure they understand what constitutes fundamental research and that specific contracting terms are available that should be used in those instances.

Response: This rule aims to clarify issues surrounding restrictions currently being placed on the release of unclassified information arising from fundamental research projects. Developing a formal outreach program is outside of the scope of this rule, however the publication of this final rule serves as outreach for rulemaking action.

C. Other changes

1. Subparagraph 252.204-7000(b)(1) of the proposed rule, which provided exceptions for information required as part of an official Defense Contract Audit Agency audit or DoD Inspector General investigation, or by a Congressional or Federal subpoena, is removed, because the clause did not previously protect the information from release under these circumstances.

2. Subparagraph 252.204-7000(b)(3) of the proposed rule is revised to delete "except as otherwise provided by applicable Federal statutes regulations, or Executive orders." Subparagraph 252.204-7000(d) of the proposed rule is revised to clarify that the paragraph requiring the flowdown of the contract clause should also be included in any subcontracts, in order to provide flowdown to lower tier subcontracts.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

This final rule implements guidance provided by the Undersecretary of Defense for Acquisition, Technology and Logistics (AT&L) in a memorandum dated May 24, 2010, by providing a fundamental research exception to the general rule against disclosure of unclassified information. The subject matter of this final rule was previously included in proposed rule 2011-D039, which was published in the Federal Register on June 29, 2011 (76 FR 38089); however, the text was deemed more appropriate for a stand-alone case because this subject matter deals with the release of information and not the safeguarding of information. An initial regulatory flexibility analysis was prepared, and no public comments were received. Also, DoD received no comments by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule.

This final rule applies to all Federal contractors, regardless of size or business ownership, when responding to solicitations or being awarded contracts that include requirements that meet the definition of fundamental research as contained within NSDD 189. The final rule is not expected to have a significant impact on small entities, because the rule aims to implement policy guidance that is already being followed within DoD regarding restrictions on the disclosure of fundamental research.

The rule does not contain any reporting or recordkeeping requirements and does not require contractors to expend significant cost or effort. There are no known significant alternatives to the rule that would further minimize any economic impact of the rule on small entities.

V. Paperwork Reduction Act

The rule does not add any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for part 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR Chapter 1.

2. Revise section 252.204-7000 to read as follows:

252.204-7000 Disclosure of information.

As prescribed in [204.404-70](#)(a), use the following clause:

DISCLOSURE OF INFORMATION (AUG 2013)

(a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless—

(1) The Contracting Officer has given prior written approval;

(2) The information is otherwise in the public domain before the date of release; or

(3) The information results from or arises during the performance of a project that has been scoped and negotiated by the contracting activity with the Contractor and research performer and determined in writing by the Contracting Officer to be fundamental research in accordance with National Security Decision Directive 189, National Policy on the Transfer of Scientific, Technical and Engineering Information, in effect on the date of contract award and the USD (AT&L) memoranda on Fundamental Research, dated May 24, 2010, and on Contracted Fundamental Research, dated June 26, 2008, (available at DFARS PGI 204.4).

(b) Requests for approval under paragraph (a)(1) shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall

submit its request to the Contracting Officer at least 10 business days before the proposed date for release.

(c) The Contractor agrees to include a similar requirement, including this paragraph (c), in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

(End of clause)

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